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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

In re Conagra Foods, Inc.

CASE NO. CV 11-05379-MMM (AGR_x)

CLASS ACTION

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

DATE: November 7, 2011

TIME: 10:00 a.m.

CTRM.: 780

JUDGE: Hon. Margaret M. Morrow

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1 **I. INTRODUCTION**

2 This case is about Defendant ConAgra Foods, Inc.’s (“ConAgra”)
3 unlawfully misleading consumers by marketing cooking oils made with
4 genetically-modified ingredients as being “100% Natural.”

5 The phrase “100% Natural” means something to consumers or ConAgra
6 wouldn’t use it. The reasonable consumer believes that a product that is
7 represented as being “100% Natural” is from nature, and is neither synthetic nor
8 artificial. Correspondingly, a reasonable consumer would not believe that a
9 product represented as being “100% Natural” was made with ingredients
10 concocted in a science lab through genetic engineering. As alleged in the Class
11 Action Complaint (“Complaint” or “Compl.”), even companies promoting
12 genetically-engineered foods define those foods as not “natural.” Compl. ¶¶ 4, 20,
13 22. By marketing its Wesson cooking oils (“Wesson Oils”) made with genetically-
14 modified ingredients as “100% Natural,” ConAgra misrepresents these oils in a
15 way that is likely to deceive consumers contrary to California law.

16 ConAgra’s motion to dismiss ignores Plaintiff’s allegations. It constructs a
17 “straw man” premise, contending that Plaintiff alleges that ConAgra *must disclose*
18 that its Wesson Oils are made from genetically-modified ingredients. Def.’s Br. at
19 1 (“[P]laintiff’s claim is that ConAgra violated California’s consumer protection
20 statutes because the labels on Wesson Oil products do not reflect the fact that the
21 oils are made from plants developed through bioengineering.”) But that is not
22 what Plaintiff alleges. Rather, Plaintiff seeks to hold ConAgra responsible for the
23 misleading information it chose independently to put on the label (*i.e.*, “100%
24 Natural”), not information that is missing.

25 ConAgra devotes the bulk of its brief not to the sufficiency of Plaintiff’s
26 allegations (which it only addresses in the last page and a half), but to legal and
27 procedural technicalities that are inapplicable because they address only
28 Defendant’s straw man premise.

1 First, contrary to Defendant's assertion that federal labeling regulations
 2 established by the Food & Drug Administration (the "FDA") preempt California
 3 law, the FDA has expressly declined to regulate the term "natural" because of
 4 "resource limitations and other agency priorities," even though the FDA recognizes
 5 it is used to make misleading claims. FDA, *Food Labeling: Nutrient Content*
 6 *Claims, General Principles, Petitions, Definitions of Terms; Definitions of Nutrient*
 7 *Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food*, 58 Fed.
 8 Reg. 2302, 2407 (Jan. 6, 1993) ("FDA Food Labeling Guide"). The FDA's
 9 decision not to regulate the term "natural" dispenses with Defendant's preemption
 10 argument, and reinforces the role of state law in protecting consumers from
 11 companies like ConAgra that may otherwise try to mislead them by claiming
 12 unnatural products are "100% Natural." Courts within, and outside of, the Ninth
 13 Circuit routinely reject preemption arguments against allegations that a product is
 14 deceptively labeled as "natural." Indeed, ConAgra lost the *identical* arguments it
 15 raises here in *Lockwood v. Conagra Foods, Inc.*, 597 F. Supp. 2d 1028 (N.D. Cal.
 16 2009), where the plaintiff alleged that ConAgra's "all natural" designation on pasta
 17 sauces was misleading because ConAgra made those sauces with high fructose
 18 corn syrup, which is a chemically-processed sugar.

19 Second, Defendant contends that even if Plaintiff's claims are not
 20 preempted, the Court should defer to the FDA under the "primary jurisdiction"
 21 doctrine. But deferring to a federal agency under the doctrine of primary
 22 jurisdiction is only appropriate if the issue either requires technical expertise to
 23 resolve or is an issue of first impression that Congress intended the agency to
 24 address. Neither circumstance applies here. Whether a claim is misleading under
 25 California law does not require technical expertise to resolve, nor is the FDA better
 26 suited to decide the issue than a California court. And this is not an issue of first
 27 impression as the FDA has already declined to regulate the term "natural." FDA
 28 Food Labeling Guide at 2407.

1 Finally, Defendant argues that Plaintiff's claims are not properly pled under
 2 Rules 8 and 9(b) and are not "plausible" under *Bell Atlantic Corporation v.*
 3 *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 979 (2007). Rule 8 merely
 4 requires a plaintiff to show why he or she is entitled to relief, while Rule 9(b)
 5 requires a plaintiff whose claims "sound in fraud" to state the "who, what, when,
 6 where, and how" of the fraud. Similarly, *Twombly* requires a plaintiff to state
 7 "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at
 8 556. Plaintiff's claims easily meet, and indeed surpass, these basic pleading
 9 standards by alleging facts that this and other courts have repeatedly held to be
 10 sufficient.

11 Accordingly, the Court should deny Defendant's motion to dismiss.

12 **II. BACKGROUND**

13 **A. Genetically-Modified Oils Are Not "100% Natural"**

14 Contrary to Defendant's assertion that there is no "meaningful" difference
 15 between genetically-modified and non-genetically-modified ingredients,
 16 genetically-modified ingredients are meaningfully different – by design. To
 17 manufacture a genetically-modified organism (such as the crops ConAgra uses in
 18 its Wesson Oil products), scientists introduce one or more new traits into the
 19 organism that do not occur naturally within that organism. Scientists do this by
 20 altering segments of the organism's genetic material or DNA and replacing it with
 21 segments of DNA from a foreign species, thus making it something new and
 22 different – something that a scientist created because nature could not. Compl.
 23 ¶¶ 3, 4, 23. It is precisely because nature could not create these genetic
 24 combinations that food companies pay teams of scientists to do so.

25 Defendant contends that the FDA "has conducted exhaustive scientific
 26 research" supporting Defendant's contention that there is no "meaningful"
 27 difference between genetically-modified and non-genetically-modified foods.
 28 Def.'s Br. at 1. As an initial matter, the FDA's conclusions about genetically-

1 modified foods are not exculpatory, or even relevant. To the extent the FDA has
 2 evaluated genetically-modified ingredients, it has done so only for the limited
 3 purpose of determining whether those ingredients must be disclosed on the label.
 4 58 Fed. Reg. 25837-38. In determining that genetically-modified ingredients need
 5 not be disclosed on the label, the FDA explained that it only had authority to
 6 require disclosures where a modification changed a food's "organoleptic
 7 properties" – taste, touch, and smell. *Id.* This limited review has no bearing on
 8 Plaintiff's allegations, which are not about whether oils with genetically-modified
 9 ingredients look or taste different than oils without those ingredients.

10 Additionally, the FDA states that genetic modification methods enable
 11 "modifications that would not be possible with traditional plant breeding methods"
 12 and that "[g]enetic modifications of plants can have ***unintended or unexpected***
 13 ***effects*** . . . such as an alteration in the concentration of important nutrients,
 14 increases in the level of natural toxicants, or the transfer of allergens from one
 15 species to another [that] may not be readily detected without specific test
 16 procedures." FDA, *Statement of Policy: Foods Derived From New Plant*
 17 *Varieties*, 57 Fed. Reg. 22984, 22984-86 (May 29, 1992). These unexpected
 18 effects may include "changes in bioavailability of a nutrient due to changes in form
 19 of the nutrient or the presence of increased levels of other constituents that affect
 20 absorption or metabolism," the introduction of nutrients that "differ[] significantly
 21 in structure or function . . . from such substances currently found in food," the
 22 introduction of new allergens, and antibiotic resistance. *Id.* at 29986-88.

23 Further, major genetically-modified food manufacturers and health
 24 organizations agree that genetically-modified foods are not "natural." Compl.
 25 ¶¶ 20-23. For instance, the Monsanto Company – the largest and most successful
 26 genetically-modified seed manufacturer in the world – describes genetically-
 27 modified seeds as having "their genetic makeup altered to exhibit traits that are not
 28 naturally theirs." *See id.* at ¶ 20 (citing Monsanto, <http://www.monsanto.com/>

1 newviews/Pages/glossary.aspx#g (last visited Sept. 18, 2011)). Similarly, the
 2 World Health Organization (“WHO”) describes genetically-modified seeds as
 3 “organisms in which the genetic material (DNA) has been altered in a way that
 4 does not occur naturally.” *See Id.* at ¶ 21 (*citing* WHO, [http://www.who.int/](http://www.who.int/foodsafety/publications/biotech/20questions/en/)
 5 [foodsafety/publications/biotech/20questions/en/](http://www.who.int/foodsafety/publications/biotech/20questions/en/) (last visited Sept. 18, 2011)).

6 In any event, whether there is or is not a “meaningful difference” is, in the
 7 first instance, a factual issue that cannot be resolved on a motion to dismiss, and in
 8 the second instance, is not the standard for evaluating Plaintiff’s claims under
 9 California law, which is whether a representation is “likely to deceive a reasonable
 10 consumer.” *Dvora v. Gen. Mills, Inc.*, No. CV 11-1074-GW(PLAx), 2011 WL
 11 1897349, at *6 (C.D. Cal. May 16, 2011). Plaintiff’s allegations meet this
 12 standard.

13 **B. ConAgra Markets Its Wesson Oils As “100% Natural”**

14 Despite making its Wesson Oils with genetically-modified ingredients,
 15 ConAgra markets Wesson Oils as being “100% Natural.” Compl. ¶ 13. This
 16 phrase is written in big, bright green type on the front of the label. *Id.* ¶ 15. It is
 17 prefaced by the word “Pure” and surrounded by images of a green heart, the sun,
 18 and a plate of vegetables. *See* Exhibit A attached. ConAgra uses its Wesson label
 19 to create the appearance of a 100% natural product where one does not exist. *Id.*

20 **C. The FDA Recognizes the Need to Regulate “Natural”** 21 **Claims in Food Marketing, But Cannot Do So**

22 The FDA is authorized to regulate food and nutrition labeling under the
 23 Food Drug and Cosmetic Act (the “FDCA”) and its 1990 amendment, the Nutrition
 24 Labeling and Education Act (the “NLEA”). Although the FDA adopted
 25 regulations concerning nutrient content (*e.g.*, the amount of fat or cholesterol in a
 26 food), it has taken a decidedly hands-off approach for regulating the use of
 27 “natural” in food marketing.
 28

1 In its policy statement on the use of the word “natural” in food marketing,
 2 the FDA acknowledged that “the ambiguity surrounding [the] use of this term . . .
 3 ***results in misleading claims,***” but because of “resource limitations and other
 4 agency priorities,” the FDA could not regulate the term. 58 Fed. Reg. at 2407
 5 (emphasis added).

6 **D. Plaintiff Sues ConAgra for Its False and Misleading Claim**
 7 **that Its Genetically-Modified Wesson Oils Are “100% Natural”**

8 Based on ConAgra’s representation that its Wesson Oil is “100% Natural,”
 9 Plaintiff purchased that oil for himself and his family during the relevant time
 10 period. Compl. ¶ 11. Had Plaintiff known that ConAgra’s Wesson Oil contained
 11 genetically-modified ingredients, he would not have purchased it. *Id.* Thus,
 12 Plaintiff and others who purchased Wesson Oils – all of which ConAgra falsely
 13 claims are “100% Natural” even though they contain genetically-modified
 14 ingredients – were, and continue to be, injured by ConAgra’s misrepresentations.
 15 *Id.*

16 **III. ARGUMENT**

17 **A. Defendant Fails To Meet Its Burden To Dismiss This Case**

18 Dismissal is only appropriate where a defendant shows that “the complaint
 19 lacks a cognizable legal theory or where the complaint presents a cognizable legal
 20 theory yet fails to plead essential facts under that theory.” *Wright v. Gen. Mills,*
 21 *Inc.*, No. 08cv1532, 2009 WL 3247148, at *4 (S.D. Cal. Sept. 30, 2009) (citing
 22 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984)). In
 23 evaluating a motion to dismiss, the “factual allegations of the complaint must be
 24 accepted as true.” *Von Koenig v. Snapple Beverage Corp.*, 713 F. Supp. 2d 1066,
 25 1072 (E.D. Cal. 2010).

26 Defendant moves to dismiss Plaintiff’s claims on three grounds, each of
 27 which fails as a matter of law, fact, or both. First, Plaintiff’s claims are not
 28 preempted by federal law. Second, this Court should not defer to the FDA under

1 the primary jurisdiction doctrine because that doctrine is inapplicable here. Third,
 2 Plaintiff adequately pled his claims. Accordingly, Defendant's motion to dismiss
 3 should be denied.

4 **B. Plaintiff's Claims Are Not Preempted**

5 Defendant argues that Plaintiff's claims are preempted by federal law.
 6 Def.'s Br. at 18. Federal law preempts state law if: (1) Congress enacts a law
 7 expressly preempting state regulation in a given area; (2) federal regulation in a
 8 particular field is so pervasive that there is no room for state regulation in that
 9 field; or (3) it is impossible to comply with both the state and federal law. *Chae v.*
 10 *SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 458, 178 L.
 11 Ed. 2d 287 (2010). None of these apply here, and Defendant does not contend that
 12 California law is preempted because it is impossible to comply with both
 13 California and federal law. Thus, Plaintiff addresses only whether federal law
 14 expressly or impliedly preempts California law.

15 Courts apply a presumption against preemption. *Holk v. Snapple Beverage*
 16 *Corp.*, 575 F.3d 329, 334 (3d Cir. 2009) ("we must begin our analysis by applying
 17 a presumption against preemption") (citing *Cipillone v. Liggett Grp., Inc.*, 505 U.S.
 18 504, 449, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)); *see also Bates v. Dow*
 19 *Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 161 L. Ed. 2d 687 (2005)
 20 (explaining that where there are two plausible interpretations of a statute, courts
 21 "have a duty to accept the reading that disfavors pre-emption"). This is
 22 particularly so in areas of traditional state regulation, such as food labeling. *Turek*
 23 *v. Gen. Mills, Inc.*, 754 F. Supp. 2d 956, 958 (N.D. Ill. 2010) ("food labeling has
 24 been an area historically governed by state law"); *accord Astiana v. Ben & Jerry's*
 25 *Homemade, Inc.*, No. C 10-4387 PJH, 2011 WL 2111796, at *8 (N.D. Cal. May
 26 26, 2011) (citing *Plumley v. Massachusetts*, 155 U.S. 461, 472, 15 S. Ct. 154, 39 L.
 27 Ed. 223 (1894) ("If there be any subject over which it would seem the States ought
 28

1 to have plenary control . . . it is the protection of the people against fraud and
2 deception in the sale of food products.”)).

3 **1. The NLEA Does Not Expressly Preempt Plaintiff’s** 4 **Claims**

5 Defendant asserts that Plaintiff’s claims are expressly preempted by the
6 NLEA’s express preemption clause, which preempts state law claims that impose
7 disclosure requirements inconsistent with those required by the NLEA or FDCA.
8 The NLEA’s express preemption clause states that no state “may directly or
9 indirectly establish . . . any requirement for the labeling of the food of the type
10 required by section . . . 403(i)(1) . . . that is not identical to the requirement of such
11 section.” 21 U.S.C. § 343-1(a). Section 403(i)(1) in turn merely requires that
12 foods be called by their “common or usual name.” In other words, corn should be
13 called “corn” and canola oil should be called “canola oil.” But this has nothing to
14 do with Plaintiff’s claims.

15 Plaintiff claims that Defendant marketed an artificially-created product as
16 being “100% Natural.” Courts have repeatedly held that such claims cannot be
17 expressly preempted under the NLEA because state law claims concerning false
18 and misleading labeling are not included in the discrete list of claims the NLEA
19 expressly preempts. *See Holk*, 575 F.3d at 338 (“These provisions [expressly
20 preempting some state law claims] demonstrate that Congress was cognizant of the
21 operation of state law and state regulation in the food and beverage field, and it
22 therefore enacted limited exceptions in NLEA.”); *Lockwood*, 597 F. Supp. 2d at
23 1031 (holding the NLEA’s express preemption provision inapplicable to a
24 plaintiff’s claim that ConAgra misled consumers by calling its pasta sauce “all
25 natural” when it contained high-fructose corn syrup); *Wright*, 2009 WL 3247148,
26 at *2 (explaining that state laws concerning false or misleading food labeling “do
27 not fall within the FDCA’s express preemption provisions”); *In re Farm Raised*
28 *Salmon Cases*, 175 P.3d 1170, 1179 (Cal. 2008) (“Congress made clear that the

1 preemptive scope of [the NLEA] was to sweep no further than the plain language
 2 of the statute itself.”), *cert. denied, Albertson’s v. Kanter*, 555 U.S. 1097, 129 S.
 3 Ct. 896, 173 L. Ed. 2d 106 (2009); *see also Wyeth v. Levine*, 555 U.S. 555, 129 S.
 4 Ct. 1187, 1200, 173 L. Ed. 2d 51 (2009) (“The case for federal preemption is
 5 particularly weak where Congress has indicated its awareness of the operation of
 6 state law in a field of federal interest, and has nonetheless decided to stand by both
 7 concepts and to tolerate whatever tension there [is] between them.”) (quoting
 8 *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67, 109 S. Ct.
 9 971, 103 L. Ed. 2d 18 (1989) (internal quotation marks omitted)). As these cases
 10 show, Plaintiff’s claims are not expressly preempted.

11 To avoid this result, Defendant attempts to recast Plaintiff’s claims as
 12 faulting Defendant for failing to disclose certain information on its labels rather
 13 than holding it accountable for misleading information it affirmatively chose to
 14 print on to its labels. *See, e.g.*, Def.’s Br. at 1 (“In essence, Plaintiff’s claim is that
 15 ConAgra violated California’s consumer protection statutes because the labels on
 16 Wesson Oil products do not reflect the fact that the oils are made from plants
 17 developed through bioengineering, rather than from plants developed through other
 18 methods of selective breeding.”); Def.’s Br. at 15 (“there is no requirement that
 19 food producers specify that plants used to make an oil were developed through
 20 bioengineering – the information Plaintiff complains is missing here”). This is not
 21 what Plaintiff says in the Complaint, either in fact or “in essence.” The Complaint
 22 very clearly alleges that ConAgra violated the law by affirmatively
 23 misrepresenting that Wesson Oils are “100% Natural,” and it very clearly does not
 24 allege that ConAgra is liable because ConAgra failed to disclose that the oils are
 25 made from genetically-modified plants.

26 The NLEA is a “disclosure requirement,” regulating what a company must
 27 put on its label. *Holk*, 575 F.3d at 336, n.3. By attempting to transform Plaintiff’s
 28 claims from ones seeking to **remove** and hold ConAgra accountable for misleading

1 information already on its labels (“100% Natural”) into claims requiring ConAgra
 2 to **add** disclosures (*e.g.*, disclosing the presence of genetically-modified ingredients
 3 on the label), ConAgra hopes to convince the Court that the NLEA preempts
 4 Plaintiff’s claims. *Id.* (FDCA’s provisions regarding what companies must put on
 5 a label is “an important distinction” from claims about what a company cannot put
 6 on a label).

7 Additionally, the cases Defendant cites purportedly supporting preemption
 8 miss the mark. For instance, the *Turek* court held the plaintiff’s claims were
 9 preempted because the plaintiff sought to force the defendant to disclose on the
 10 label that its product contained “non-natural” fiber. 754 F. Supp. 2d 956.
 11 Additionally, unlike here, *Yumul v. Smart Balance, Inc.*, No. CV 10-00927
 12 MMM(AJWx), 2011 WL 1045555 (C.D. Cal. Mar. 14, 2011), involved (1) a
 13 nutrient content claim (“Cholesterol Free”) governed by the NLEA, and (2) the
 14 parties agreed the product was, in fact, cholesterol free (although the plaintiff
 15 considered this misleading since the product contained trans fat, which may raise
 16 cholesterol). Likewise, *Peviani v. Hostess Brands, Inc.*, 750 F. Supp. 2d 1111
 17 (C.D. Cal. 2010), and *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, No. C 10-01044
 18 JSW, 2011 WL 159380 (N.D. Cal. Jan. 10, 2011), also involved a nutrient content
 19 claim expressly covered by the NLEA (the amount of a certain type of fat in the
 20 product). Because Plaintiff’s claims are not about forcing Defendant to include
 21 additional information on its labels, let alone information about specific nutrients,
 22 Defendant’s argument fails. *See Turek*, 754 F. Supp. 2d at 961 (explaining that
 23 since the NLEA is a disclosure requirement, “express preemption would fail” for
 24 claims that information already on a product label is misleading).

25 **2. Plaintiff’s Claims Cannot Be Impliedly Preempted**

26 **a. The NLEA Precludes Implied Preemption**

27 Defendant seems to indirectly raise the possibility that Plaintiff’s claims may
 28 be impliedly preempted. *See* Def.’s Br. at 10 (“In addition to the extensive

1 regulatory apparatus governing bioengineered crops and the foods derived from
 2 them, federal law imposes a detailed statutory and regulatory framework governing
 3 numerous aspects of food labeling.”). To the extent Defendant argues that
 4 Plaintiff’s claims are impliedly preempted, the Court should reject that argument.

5 Implied preemption occurs where federal regulation in an area is so
 6 comprehensive that there is “no room” for state regulation. *Rice v. Santa Fe*
 7 *Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947). In areas
 8 of traditional state regulation, such as food labeling, courts “assume[] that a federal
 9 law does not supplant state law unless Congress has made such an intention clear
 10 and manifest.” *Astiana*, 2011 WL 2111796, at *8.

11 But the NLEA precludes implied preemption. By the NLEA’s terms, it
 12 “shall not be construed to preempt any provision of State law, unless such
 13 provision is expressly preempted under [21 U.S.C. § 343-1] of the Federal Food,
 14 Drug, and Cosmetic Act.” Nutrition Labeling and Education Act of 1990, Pub. L.
 15 No. 101-535, § 6(c)(1) (1990). As explained above, neither 21 U.S.C. § 343-1, nor
 16 the FDA as authorized under 21 U.S.C. § 343-1, regulates the use of the word
 17 “natural” in food marketing, let alone “100% Natural”—the phrase at issue here.
 18 Since claims concerning the use of “100% Natural” are not expressly preempted,
 19 the NLEA precludes them from being impliedly preempted.

20 Courts examining similar claims consistently reach the same conclusion. In
 21 *Holk*, the plaintiff claimed that Snapple misled consumers under state law by
 22 claiming its teas were “all natural” even though they contained high-fructose corn
 23 syrup. 575 F.3d at 333. The defendant argued that the FDA’s “exhaustive”
 24 regulations supported finding plaintiff’s claims foreclosed by implied preemption.
 25 *Id.* at 337. The court rejected that argument, explaining that the “NLEA declares
 26 that courts may not find implied preemption based on any provision of NLEA.”
 27 *Id.* at 336; *see also Von Koenig*, 713 F. Supp. 2d at 1076 (“The court finds the
 28 Third Circuit’s conclusion [in *Holk*] that the FDA’s policy did not amount to

1 federal law for purposes of preemption persuasive in analyzing whether federal law
2 bars plaintiff's claims.”).

3 In *Astiana v. Ben & Jerry's Homemade, Inc.*, the plaintiff alleged that Ben &
4 Jerry's misled consumers by describing its ice cream as “all natural” even though it
5 contained an ingredient (alkalized cocoa) that plaintiff claimed to be unnatural.
6 2011 WL 2111796, at *1. The defendant argued that plaintiff's claims should be
7 preempted by the “comprehensive federal scheme of food regulation.” *Id.* at *6.
8 Like *Holk*, the court in *Astiana* refused to find plaintiff's claims were impliedly
9 preempted. As the court explained, the “purpose of the NLEA . . . is not to
10 preclude all state regulation of nutritional labeling, but to ‘prevent State and local
11 governments from adopting inconsistent requirements with respect to the labeling
12 of nutrients. . . . [T]here is no indication of any [FDA] regulation of the use of an
13 adjective such as ‘natural’ on a food label.’” *Id.* at *8, 10 (quoting H.R. Rep. No.
14 101-538, at 10 (1990)); accord 58 Fed. Reg. 2302 (the FDA's Policy Statement)
15 (explaining that the FDA will not regulate the use of “natural” in food marketing).

16 In *Wright v. General Mills, Inc.*, the plaintiff alleged that Nature Valley
17 misled consumers by marketing its granola bars as “100% Natural” despite their
18 containing high-fructose corn syrup. 2009 WL 3247148, at *1. The defendant
19 argued that the plaintiff's claims were impliedly preempted by the FDA's
20 “detailed, rigorous, and comprehensive system for labeling food products through
21 the FDCA . . . and related regulations.” *Id.* at *2. In rejecting that argument, the
22 court explained that “[a]lthough the FDA has promulgated several food-labeling
23 requirements, Congress has specifically indicated that it does not intend to occupy
24 the field of food and beverage nutritional labeling.” *Id.*; see also 136 Cong. Rec.
25 S16607 (Oct. 24, 1990) (Nutrition Labeling and Education Act of 1990, statement
26 of Sen. Mitchell) (“It is also important that this program, which requires national
27 uniform nutritional labeling, is sensitive to the regulatory roles played by the
28

1 States. This bill has been refined to provide national uniformity where it is most
 2 necessary, while otherwise preserving State regulatory authority.”).

3 Finally, in *Lockwood v. ConAgra Foods, Inc.*, the court determined that a
 4 consumer’s claims that ConAgra misled consumers by advertising its pasta sauce
 5 as “all natural” when it contained high-fructose corn syrup were not impliedly
 6 preempted. 597 F. Supp. 2d at 1034. In rejecting the defendant’s preemption
 7 arguments, the court explained:

8 The FDA’s “policy” about the use of the word “natural” in a food
 9 label also suggests an intent *not to occupy* the field. . . .

10
 11 Although the FDA acknowledges that consumers are being misled by
 12 the use of the term “natural,” it has declined to adopt any regulations
 13 governing this term. *This inaction is consistent with an intent not to*
 14 *occupy the field.* This is especially so given that at the time the FDA
 15 declined to formally define ‘natural’ it was aware of and had reviewed
 16 state regulation of the use of the term, yet it made no mention of the
 17 need for uniformity or a preemptive federal regulation, instead it
 18 declined to take any action.

19 597 F. Supp. 2d at 1033-34 (emphasis added) (internal citations omitted); *see also*
 20 *Wyeth*, 129 S. Ct. at 1200 (“If Congress thought state-law suits posed an obstacle
 21 to its objectives, it surely would have enacted an express pre-emption provision at
 22 some point during the FDCA’s 70-year history.”).

23 As these cases and the NLEA’s plain language show, Plaintiff’s claims
 24 cannot be impliedly preempted.

25 **b. The FDA’s Hands-Off Policy Towards Genetically-**
 26 **Modified Foods Further Underscores Why Plaintiff’s**
Claims Cannot Be Impliedly Preempted

27 In addition to not regulating the use of the term “natural” on product labels,
 28 the FDA has adopted a hands-off policy towards regulating products with

1 genetically-modified ingredients. Although Defendant claims that the FDA “has
2 conducted extensive scientific research, and has concluded that bioengineered
3 foods do not, as a class, differ in any meaningful way from foods made from plants
4 developed through older methods of genetic selection[,]” Def.’s Br. at 1, that is
5 simply not true.

6 Defendant misrepresents the FDA’s oversight of genetically-modified foods.
7 Defendant quibbles with the relevant terminology to describe foods whose DNA is
8 altered in a lab, saying in a footnote that the FDA uses “bioengineering” instead of
9 “genetic modification” to describe the technology used to alter the DNA of
10 different foods. Def.’s Br. at 6, n.3. Defendant claims this is because the FDA
11 purportedly recognizes that “modern methods of bioengineering are simply an
12 extension of historical methods.” *Id.* But Defendant is wrong on both counts. For
13 one thing, the FDA uses “genetic modification” throughout the very publication
14 Defendant cites to describe the same technology Defendant insists should be called
15 “bioengineering.” *See* 57 Fed. Reg. 22984 (using “genetic modification” over
16 twenty times and “bioengineering” zero times to describe the technology used to
17 alter DNA in different foods). And even if the FDA uses “bioengineering” in some
18 of its publications, this is hardly dispositive of anything, nor does it imply that the
19 FDA recognizes genetic modification or bioengineering to be the same as
20 traditional agricultural methods. For instance, in its Policy Statement, the FDA
21 explains that “new methods of genetically modifying plants are being used to
22 develop new varieties . . . including some modifications that would not be possible
23 with traditional plant breeding methods.” *Id.* Finally, the food industry and
24 ConAgra itself uses “genetic modification” in the same way that Plaintiff does.
25 *See, e.g.,* Monsanto, <http://www.monsanto.com/newsviews/Pages/glossary.aspx#g>
26 (last visited Sept. 26, 2011); ConAgra, [http://company.conagrafoods.com/](http://company.conagrafoods.com/phoenix.zhtml?c=202310&p=corp_consumers#FoodSafetyQuality)
27 [phoenix.zhtml?c=202310&p=corp_consumers#FoodSafetyQuality](http://company.conagrafoods.com/phoenix.zhtml?c=202310&p=corp_consumers#FoodSafetyQuality) (describing one
28

1 of its brands as being made from “non-GMO soy seeds”) (last visited June 24,
2 2011).

3 Additionally, the FDA’s role in evaluating genetically-modified foods is far
4 less involved than Defendant portrays. Contrary to Defendant’s assertion that the
5 “FDA monitors the introduction and labeling of new bioengineered foods,” the
6 FDA explains in its Policy Statement that it does not “conduct, prior to marketing,
7 routine safety reviews of whole food derived from plants.” Def.’s Br. at 7; 57 Fed.
8 Reg. 27984. Instead, the FDA delegates that responsibility to manufacturers such
9 as ConAgra. As the FDA explains in its Policy Statement, “It is the responsibility
10 of the producer of a new food to evaluate the safety of the food.” *Id.* at 22990.

11 ConAgra also exaggerates the voluntary “consultation process” by which
12 manufacturers of genetically-modified ingredients meet with the FDA and
13 determine whether their products require additional disclosures on the label. Def.’s
14 Br. at 8-9. First, underscoring the lax nature of these consultations, ConAgra
15 admits it does not participate in them even though it is responsible for the labels at
16 issue here. *Id.* And even for manufacturers that choose to consult with the FDA,
17 the FDA’s “evaluation” is based only on whatever limited and (potentially biased)
18 information the manufacturer chooses to provide. In fact, a recent study of the
19 FDA’s requests for additional information during the consultation process found
20 that food manufacturers often refused to provide the requested information. *See*
21 Doug Gurian-Sherman, Ph.D., *Holes in the Biotech Safety Net: FDA Policy Does*
22 *Not Assure the Safety of Genetically Engineered Foods*, Center for Science in the
23 Public Interest, http://www.cspinet.org/new/pdf/fda_report__final.pdf (last visited
24 Sept. 30, 2011). Yet, as even Defendant admits, “in each case, the agency has
25 accepted the developers’ conclusions [about product safety].” Def.’s Br. at 9.

26 **C. The “Primary Jurisdiction” Doctrine Is Inapplicable**

27 Defendant urges the Court to dismiss or stay this action under the primary
28 jurisdiction doctrine because Defendant claims “the FDA has decades of

1 experience and specialized resources not available to the Court.” Def.’s Br. at 18.
2 Defendant’s request is baseless and should be denied.

3 The primary jurisdiction doctrine (which is rarely invoked) allows courts, at
4 their discretion, to stay or dismiss actions requiring technical expertise in deference
5 to the administrative agency with “special competence” in that area. *See Clark v.*
6 *Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).

7 The doctrine is inapplicable here. First, the FDA has expressly declined to
8 regulate the term “natural,” so there is no reason for this Court to delay in
9 addressing the issues raised by Plaintiff.

10 Second, whether ConAgra’s use of the phrase “100% Natural” is misleading
11 is not an issue that requires technical expertise or specialized knowledge to resolve.
12 Courts considering this issue have repeatedly held the same. For instance, in
13 *Lockwood*, the court rejected ConAgra’s request to stay or dismiss that case based
14 on primary jurisdiction where the plaintiff alleged defendant’s use of “all natural”
15 in marketing its pasta sauces made with high-fructose corn syrup was misleading.
16 As the court explained, “this is not a technical area in which the FDA has greater
17 technical expertise than the courts – every day courts decide whether conduct is
18 misleading.” 597 F. Supp. 2d at 1035.

19 Similarly, in *Wright v. General Mills, Inc.*, the plaintiff alleged that the
20 defendant misled consumers by claiming its granola bars were “100% Natural.”
21 2009 WL 3247148. There, the court also refused to apply the primary jurisdiction
22 doctrine. As in *Lockwood*, the court reasoned that “state law claims based upon
23 the use of the term ‘natural’ is not an issue of first impression, does not require
24 technical expertise within the special competence of the FDA, and is not a
25 particularly complicated issue outside of the ability of the Court to consider and
26 decide.” *Id.* at *3; accord *Chacanaca v. The Quaker Oats Co.*, 752 F. Supp. 2d
27 1111, 1124 (N.D. Cal. 2010) (“whether or not the ‘smart choices made easy’ decal,
28 the photographs of oats, nuts, and children in soccer uniforms, or the term

1 ‘wholesome’ are misleading – [does] not entail technical questions or require
2 agency expertise”).

3 Finally, Plaintiff’s claims are based on state law. Thus, even if the FDA
4 chose to regulate use of the term “natural” in food marketing, this would not affect
5 Plaintiff’s state law claims. *See Lockwood*, 597 F. Supp. 2d at 1035 (“plaintiffs’
6 claims are based on state law and . . . even if the FDA were to formally define
7 ‘natural,’ federal law would not dispose of plaintiffs’ state law claims”).

8 The primary jurisdiction doctrine is thus inapplicable here.

9 **D. Plaintiff’s Claims Are Properly Pled**

10 Defendant argues that Plaintiff’s pleadings are insufficient because: (1)
11 Plaintiff fails to plead sufficient facts under Rules 8 and 9(b), and (2) Plaintiff’s
12 claims are not “plausible” under *Twombly*, 550 U.S. at 555. Defendant is wrong.

13 **1. Plaintiff’s Claims Are Sufficient Under Rule 8**

14 Defendant erroneously claims that Plaintiff’s claims are insufficient under
15 Rule 8. Rule 8 merely requires that a complaint contain “a short and plain
16 statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v.*
17 *Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). Plaintiff meets this
18 standard.

19 First, Defendant argues that Plaintiff should have included certain additional
20 details, but none of the examples cited by Defendant are required by Rule 8, nor
21 are they particularly important. For instance, Defendant asserts that “[w]ith the
22 exception of one date, on which he presumably made a single purchase, Plaintiff
23 does not disclose when or where he purchased ConAgra’s oils.” Def.’s Br. at 21.
24 Such details are irrelevant under Rule 8. Plaintiff alleges in the Complaint that he
25 “regularly purchased” ConAgra’s Wesson Canola Oil throughout the Class Period.
26 Compl. at 3. Additionally, there is no requirement—and, indeed, Defendant cites
27 no authority to support the proposition—that a plaintiff is required to have
28

1 purchased a product multiple times or on multiple dates before he/she can
2 plausibly claim that the labeling on the product is misleading.

3 Second, Defendant claims that Plaintiff “complains of ConAgra’s
4 ‘representation that Wesson Canola Oil[] was 100% natural,’ but does not state
5 when or where he read this—on the label of the product he was buying, on
6 ConAgra’s web site, or somewhere else.” Def.’s Br. at 21. Again, the allegations
7 in the Complaint flatly contradict Defendant’s assertion. *See* Compl. at 3-4
8 (Plaintiff describes the information on the label and its appearance). Moreover,
9 Defendant’s reliance on *Kearns v. Ford Motor Co.*, 567 F.3d 1120 (9th Cir. 2009)
10 and *Marolda v. Symantec Corp.*, 672 F. Supp. 2d 992 (N.D. Cal. 2009), is
11 misplaced. Unlike here, *Kearns* involved no labeling and was instead about
12 purported misrepresentations made during the sale of a car. 567 F.3d at 1126.
13 *Marolda* is similarly inapposite as it dealt with purported omissions on a company
14 website rather than affirmative misrepresentations as is the case here. 672 F. Supp.
15 2d at 998. In any event, ConAgra’s admittedly ubiquitous marketing of its Wesson
16 Oils as being “100% Natural” – including on the label itself – make it irrelevant
17 which particular advertisement Plaintiff saw or in what format. *See In re Ferrero*
18 *Litig.*, No. 11-CV-205 H (CAB), 2011 U.S. Dist. LEXIS 97488, at *5-6 (S.D. Cal.
19 Aug. 29, 2011) (“[W]here . . . a plaintiff alleges exposure to a long-term
20 advertising campaign, the plaintiff is not required to plead with an unrealistic
21 degree of specificity that the plaintiff relied on particular advertisements or
22 statements.”) (quoting *In re Tobacco II Cases*, 207 P.3d 20, 40 (2009)).

23 Third, Defendant takes issue with the fact that Plaintiff purportedly does not
24 allege that he “bought a Wesson Oil other than canola, although he seeks to
25 represent every person in the country who bought any one of four oils in the last
26 four years.” Def.’s Br. at 21. ConAgra does not deny that all of its Wesson Oils
27 are marketed as “100% Natural,” but are made with genetically-modified
28 ingredients. Plaintiff bought one of the Wesson Oils based on ConAgra’s

1 misrepresentation and was misled and is harmed in the same way as all purchasers
 2 of Wesson Oils were – regardless of whether the particular Wesson Oil was canola
 3 oil or one of the other three kinds at issue. Defendant’s contention is thus a
 4 distinction without a difference. *See, e.g., Von Koenig*, 713 F. Supp. 2d 1066
 5 (upholding class claims related to a defendant’s “drink products,” which included
 6 different teas and juices, even though plaintiff never purported to purchase every
 7 flavor of those products).

8 Fourth, Defendant asserts that because Plaintiff “does not even allege *that*
 9 the Wesson Oil he bought was made” with genetically-modified ingredients that
 10 somehow this makes Plaintiff’s claims deficient. Def.’s Br. at 21 (emphasis in
 11 original). But Plaintiff *does* allege that he purchased Wesson Oil made with
 12 genetically-modified ingredients. As the Complaint says, “Plaintiff paid for a
 13 100% natural product, but did not receive a product that was 100% natural.
 14 Plaintiff received a product that was genetically engineered in a laboratory, and
 15 had its genetic code artificially altered to exhibit not ‘natural’ qualities.” Compl.
 16 ¶ 11. Defendant’s argument is thus groundless.

17 Finally, Defendant argues that “[o]n similar facts, the Southern District of
 18 California [in *Wright v. General Mills*] dismissed claims challenging food labels
 19 under state consumer protection law.” Def.’s Br. at 21. However, in a more recent
 20 case, the only court in this District to discuss *Wright* expressly disagreed with the
 21 *Wright* court’s conclusion that the plaintiff’s allegations there were insufficient.
 22 *See Red v. Kraft Foods, Inc.*, 754 F. Supp. 2d 1137, 1145 (C.D. Cal. 2010) (while
 23 finding plaintiff’s allegations sufficient, the court dismissed the defendant’s
 24 reliance on *Wright*, noting that “[In *Wright*,] the district court found the allegation
 25 that, as a result of defendant’s conduct, plaintiffs . . . purchased more of, or paid
 26 more for defendant’s products to be insufficient to allege an injury under federal
 27 pleading standards. *It hardly needs to be said that many courts have found*
 28

1 *similar allegations to be sufficient.*”) (collecting authorities) (internal citation
2 omitted).

3 **2. Plaintiff’s Claims Satisfy Rule 9(b)’s “Specificity”** 4 **Requirement**

5 Defendant further asserts that Plaintiff’s claims lack the requisite specificity
6 under Rule 9(b). *See* Def.’s Br. at 22. Rule 9(b) requires a plaintiff whose claims
7 “sound in fraud” to put forth allegations “specific enough to give defendants notice
8 of the particular misconduct . . . so that they can defend against the charge and not
9 just deny that they have done anything wrong.” *Chacanaca*, 752 F. Supp. 2d at
10 1126 (citation omitted).

11 Defendant claims that Plaintiff fails to meet this standard because Plaintiff
12 purportedly “fails to provide facts establishing the ‘who, what, when, where and
13 how’ of his purported reliance” on Defendant’s misrepresentations. Def.’s Br. at
14 22.

15 Defendant’s position is wrong and is contradicted by several recent
16 decisions involving similar disputes. For instance, in *Chacanaca*, the court refused
17 to dismiss under Rule 9(b) where the plaintiffs “identified the particular statements
18 they allege are misleading, the basis for that contention, where those statements
19 appear on the product packaging, and the relevant time period in which the
20 statements were used.” 752 F. Supp. 2d at 1126. As the court there explained,
21 such allegations “satisf[y] the requisite ‘who, what, when, where, and how’ of the
22 misconduct charged.” *Id.* Similarly, in *Astiana*, in refusing to dismiss the
23 plaintiff’s case about misleading claims concerning “natural” ice cream on Rule
24 9(b) grounds, the court explained:

25 The “who” is Ben & Jerry’s, Breyers, and Unilever. The “what” is the
26 statement that the ice cream containing alkalized cocoa is “all
27 natural.” The “when” is alleged as “since at least 2006,” and
28 “throughout the class period.” The “where” is on the ice cream

1 package labels. The “how the statements were misleading” is the
 2 allegation that defendants did not disclose that the alkalizing agent in
 3 the alkalized cocoa was potassium carbonate, which plaintiffs allege is
 4 a “synthetic.”

5 2011 WL 2111796, at *6; *see also Von Koenig*, 713 F. Supp. 2d at 1077
 6 (explaining that where the plaintiff alleged that defendant made misleading
 7 representations on its product labels during a particular time period and that these
 8 misrepresentations caused plaintiff to buy defendant’s product, those allegations
 9 are sufficient under Rule 9(b)).

10 Like the plaintiffs in *Chacanaca*, *Astiana*, and *Von Koenig*, Plaintiff’s
 11 allegations here satisfy the requirements of Rule 9(b). Plaintiff alleges the “who”
 12 (ConAgra), the “what” (ConAgra’s claim that its Wesson cooking oils containing
 13 genetically-modified ingredients are “100% Natural”), the “when” (since “June 27,
 14 2007”), the “where” (“on the product label itself, the Wesson website, and all
 15 Wesson Oils’ advertisements”), and the “how the statements were misleading”
 16 (claiming a product is “100% Natural” misleads a reasonable consumer to believe
 17 that it does not contain genetically-modified ingredients). Thus, Plaintiff’s
 18 allegations satisfy Rule 9(b)’s “particularity” requirement.

19 **3. Plaintiff’s Claims Are “Plausible” Under *Twombly***

20 Defendant argues that Plaintiff’s claims are not “plausible” under *Twombly*.
 21 *See* Def.’s Br. at 20. Under *Twombly*, a motion to dismiss must be denied unless a
 22 plaintiff fails to plead “enough facts to state a claim to relief that is plausible on its
 23 face.” 550 U.S. at 570. “[A] well-pleaded complaint may proceed even if it strikes
 24 a savvy judge that actual proof of those facts is improbable and ‘that a recovery is
 25 very remote and unlikely.’” *Id.* at 556. Plaintiff’s claims far surpass this standard,
 26 and Defendant’s arguments to the contrary are baseless.

27 As an initial matter, the gravamen of Defendant’s argument – that Plaintiff
 28 could not plausibly have believed Wesson Oils were was made without

1 genetically-modified ingredients—is an issue of fact that, by its very nature, cannot
2 be resolved on a motion to dismiss. *See, e.g., Astiana*, 2011 WL 2111796, at *4
3 (explaining that the plausibility of plaintiff’s claim that he was misled by
4 defendant’s claim that its ice cream was “all natural” even though it contained
5 alkalized cocoa “involves questions of fact, and is therefore beyond the scope of
6 this Rule 12(b)(6) motion”); *Chacanaca*, 752 F. Supp. 2d at 1126 (determining that
7 whether a product was “wholesome” as its label claimed, could not be resolved on
8 a motion to dismiss).

9 Additionally, Defendant’s assertion about the purported implausibility of
10 Plaintiff’s belief is based on a false premise – that “[w]idely accessible public
11 information makes clear that 88-94% of the nation’s crops of corn, soy and canola
12 is [sic] grown from seeds that are the product of bioengineering.” Def.’s Br. at 23.
13 Even if that were true, it is of no moment. Whether most crops are grown from
14 genetically-modified seeds says nothing about whether Defendant’s advertising
15 misled Plaintiff. Moreover, Defendant’s contention that “consumers who wish to
16 avoid bioengineered foods can buy products under [ConAgra’s] Lightlife and
17 organic lines” is misleading for two reasons. Def.’s Br. at 23-24. First, the issue
18 here has nothing to do with Defendant’s other product lines, but is instead about
19 Defendant’s affirmative misrepresentation of its genetically-modified products as
20 being “100% Natural” when they, in fact, are not. Second, due to Defendant’s
21 affirmative misrepresentation of its Wesson Oil products as being “100% Natural,”
22 ConAgra intended to convey the absence of genetically-modified ingredients in its
23 Wesson Oils, thus giving consumers the false impression that they did not need to
24 buy alternative products in ConAgra’s lineup in order to avoid genetically-
25 modified ingredients.

26 Also, accessibility of information is not a factor courts consider in
27 determining whether a plaintiff properly pleads a consumer protection claim.
28 Instead, courts look to whether a statement is likely to deceive a “reasonable

1 consumer.” *See Dvora*, 2011 WL 1897349, at *6 (“To state a claim under the
 2 UCL and CLRA, Plaintiff must allege, *inter alia*, that General Mills made
 3 statements that are likely to deceive a reasonable consumer.”). To Plaintiff’s
 4 knowledge, there is not a single case where a court held that a “reasonable
 5 consumer” should be expected to divine the presence of ingredients not listed on a
 6 product’s label (*e.g.*, genetically-modified ingredients) or maintain a working
 7 knowledge of which of the purported “88-94% of the nation’s crops of corn, soy
 8 and canola” that are grown from genetically-modified seeds are included in which
 9 brands of cooking oils.

10 There is, however, ample authority supporting Plaintiff’s position that where
 11 a product contains non-natural ingredients, but claims to be all or 100% “natural,”
 12 such a claim is likely to deceive a reasonable consumer. *See, e.g., Williams v.*
 13 *Gerber Prods. Co.*, 523 F.3d 934, 939 (9th Cir. 2008) (finding a food company’s
 14 claim likely to mislead a reasonable consumer where its product was made with
 15 concentrate (*i.e.*, powder), but claimed to be made from “fruit juice and other all
 16 natural ingredients” despite the fruit juice being from concentrate); *Henderson v.*
 17 *Gruma Corp.*, CV 10-04173 AHM (AJWx), 2011 WL 1362188, at *11 (C.D. Cal.
 18 Apr. 11, 2011) (concluding that a reasonable consumer would be deceived by a
 19 guacamole product that claimed to be “all natural,” but included partially
 20 hydrogenated oil); *Hitt v. Ariz. Beverage Co., LLC*, No. 08cv809 WQH (POR),
 21 2009 WL 449190 (S.D. Cal. Feb. 4, 2009) (explaining that a reasonable consumer
 22 would be deceived by a drink claiming the drink was “All Natural” when the drink
 23 contained high-fructose corn syrup).

24 Defendant also contends that Plaintiff’s allegations are implausible because
 25 he fails to rebut the FDA’s purported determination that genetically-modified
 26 foods are “not materially different” from other foods. Def.’s Br. at 24. This half-
 27 description is entirely misleading because the FDA’s use of “materially” is a term
 28 of art unique to a particular context not relevant to this lawsuit. The FDA “has

1 generally limited the scope of the materiality concept” to a food’s “organoleptic
2 properties” – taste, touch, and smell. FDA, *Food Labeling; Foods Derived from*
3 *New Plant Varieties*, 58 Fed. Reg. 25837, 25838 (Apr. 28, 1993).

4 Moreover, that limited definition is not shared by state law. *See, e.g., Park*
5 *v. Cytodyne Technologies, Inc.*, No. GIC 76834, 2003 WL 21283814, at *5 (Cal.
6 Super. May 30, 2003) (a claim is “material” under California Business &
7 Professions Code § 17500 if “it is likely to influence the purchasing decision” of a
8 consumer); *Brackey v. Moore*, 107 Cal. App. 4th 86, 100 (2003) (a
9 misrepresentation is “material” under California Business & Professions Code
10 § 17200 if a consumer “could reasonably be deceived or confused” by it).

11 Finally, Defendant’s conduct undermines its own argument, in particular: (1)
12 Defendant devotes at least two product lines to purportedly genetically-modified
13 ingredient free foods, Compl. ¶ 18; and (2) Defendant elected to market Wesson
14 Oils as being “100% Natural,” obviously because it believed that doing so
15 conferred some benefit. Compl. ¶ 15. Defendant also does not deny Plaintiff’s
16 allegation that finding information about Defendant’s use of genetically-modified
17 ingredients on Defendant’s website is difficult to access.

18 For all these reasons, Plaintiff’s claim that he was misled by Defendant
19 claiming its Wesson Oils were “100% Natural” even though they contained
20 genetically-modified ingredients, is plausible.

1
2 **IV. CONCLUSION**

3 For the foregoing reasons, Plaintiff respectfully requests that the Court deny
4 Defendant's motion to dismiss.

5 DATED: October 10, 2011

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EXHIBIT A



DECLARATION OF SERVICE BY CM/ECF AND/OR MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, employed in the County of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is One California Plaza, 300 South Grand Avenue, Suite 3900, Los Angeles, California 90071-3149.

2. Declarant hereby certifies that on October 10, 2011, declarant served the PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS by electronically filing the foregoing document listed above by using the Case Management/ Electronic Case filing system.

3. Declarant further certifies:

☒ All participants in the case are registered CM/ECF users and that service will be accomplished by the court's CM/ECF system

☐ Participants in the case who are registered CM/ECF users will be served by the court's CM/ECF system. Participants in the case that are not registered CM/ECF users will be served by First-Class Mail, postage pre-paid or have dispatched to a third-party commercial carrier for delivery to the non-CM/ECF participants.

4. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct.
Executed this 10th day of October, 2011, at Los Angeles, California.



CECILLE CHAFFINS